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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GOLDEN EAGLE INSURANCE COMPANY, Plaintiff and Respondent, v. CENTURY SURETY COMPANY, Defendant and Appellant.	B160118 (Los Angeles County Super. Ct. No. PC025506)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Farrell, Judge. Affirmed.

O'Hara Barnes, Callie C. O'Hara and Randel L. Ledesma; Dunn Koes, Pamela E. Dunn and Daniel J. Koes for Defendant and Appellant.

Law Offices of Glenn M. White, Glenn M. White and Tamar Blaufarb for Plaintiff and Respondent.

In the underlying action for equitable contribution and indemnity by respondent Golden Eagle Insurance Company (Golden Eagle) against appellant Century Surety Company (Century), the trial court granted summary judgment in favor of Golden Eagle. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The following facts are not in dispute: In March 1991, Solemint Heights Partnership (Solemint) hired Cal Coast Construction Specialists, Inc. (Cal Coast) as a subcontractor in the construction of the River Park Apartments, a 544-unit complex in Canyon Country. Cal Coast provided rough framing, and was also involved in work on windows, ceilings, paneling, and other aspects of the project. Construction was completed in or about 1992.

Golden Eagle issued commercial general liability (CGL) insurance policies to Cal Coast for a two-year period, effective February 5, 1992. These policies contain an "other insurance" clause known as a "pro rata provision." (*Century Surety Co. v. United Pacific Ins., Co.* (*Century*) (2003) 109 Cal.App.4th 1246, 1255.) Under this provision, if other "valid and collectible" primary insurance was available to Cal Coast for a loss covered under Golden Eagle's policy, then Golden Eagle would contribute proceeds under its policy on a pro rata basis, according to enumerated methods.[1]

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[1] The "pro rata" provision states: "4. Other Insurance: [¶] If other valid and collectible insurance is available to the insured for a loss that we cover under [the coverage provisions], our obligations are limited as follows: [¶] a. Primary Insurance [¶] This insurance is primary [absent circumstances not applicable in this case]. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below. [¶] . . . [¶] c. Method of Sharing [¶] If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. [¶] If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method,

Subsequently, Century issued a CGL insurance policy to Cal Coast for a one-year period, effective February 5, 1997. The policy contains an "other insurance" clause known as an "excess only" provision. (*Century*, *supra*, 109 Cal.App.4th at p. 1255.) This clause states: "4. Other Insurance: [¶] If other valid and collectible insurance is available to any insured for a loss we cover under [the coverage provisions], then this insurance is excess of such insurance and we will have no duty to defend any such claim or 'suit' that any other insurer has a duty to defend."

On or about October 20, 1998, Solemint initiated an arbitration proceeding against Cal Coast (the Solemint action) before the American Arbitration Association (AAA). Solemint's demand for arbitration described the nature of the dispute as "[n]egligent performance of services rendered on the Riverpark project and breach of written contract," and the relief sought as "[d]amages in an amount yet to be ascertained, but which exceed $8,000,000." The demand was otherwise silent about the dates of damage, and did not indicate whether the damages were continuous and progressive or episodic in nature.

Golden Eagle defended and indemnified Cal Coast in the Solemint action. On January 15, 1999, Alan Pratali, an employee of Golden Eagle, sent Century and several other insurers copies of the demand for arbitration.

In an accompanying letter, Pratali asked Century and the other insurers to participate in the defense of Cal Coast. This letter referred to the holding in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, sometimes called "*Montrose II*," in view of a prior case, *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287 (*Montrose I*). In *Montrose II*, *supra*, 10 Cal.4th at p. 689, our Supreme Court concluded that when a third-party insurance claim involves continuous or progressively deteriorating damage extending through the coverage periods of successive policies, the

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each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers."

proper trigger of coverage is the so-called "continuous injury" or "multiple" trigger, under which coverage is triggered for *all* policies in effect during the periods.

Pratali's letter stated: "As you know, the California Supreme Court now has conclusively determined that 'the continuous injury trigger of coverage[']' should be adopted for third party liability insurance cases involving continuous or progressive deteriorating losses. . . . [¶] Based upon our initial information, the property in question was built in or around 1989. In addition, the damages are alleged to be continuous and progressively deteriorating in nature. [¶] Therefore, we believe that each of your companies has a duty to participate in the defense of the insured along with Golden Eagle."

On January 28, 1999, Cal Coast also sent a copy of the arbitration demand to Century by fax through its broker. The cover sheet stated: "Please process the attached claim A.S.A.P. We need a claim # and adjuster name and phone number, also. Your prompt response is appreciated." No other information regarding the arbitration demand accompanied Cal Coast's submission of the arbitration demand.

On January 29, 1999, Anthony Signore, a claims manager for Century, informed Cal Coast by letter that Century had received the demand "under a Montrose II tender." Singore's letter cited the "excess only" policy provision, stated that the policy provided excess coverage under the circumstances, and told Cal Coast that it would defend and indemnify Cal Coast only when primary coverage had been exhausted. On March 2, 1999, Signore sent a similar letter to Golden Eagle.

On behalf of Golden Eagle, Pratali again wrote to Century Surety on April 2, 1999, and asserted that Century had a duty to defend Cal Coast. Pratali's letter states in pertinent part: "Based upon our initial information, and according to our insured, the property in question was built in or around 1992. The insured did the framing for the project. In addition, the damages are alleged to be continuous and progressively deteriorating in nature."

On June 25, 1999, Signore responded that Century denied any duty to defend or indemnity until underlying coverage was exhausted. Thereafter, Century never paid any funds to defend or indemnify Cal Coast.

Golden Eagle spent $20,632.52 in providing a defense for Cal Coast in the Solemint action. Cal Coast ultimately agreed to pay $540,000 to settle this action, of which Golden Eagle provided $196,000. Three other insurers also contributed settlement funds.

On May 25, 2000, the Golden Eagle appellants initiated the underlying action against Century for subrogation, contribution, indemnity, and declaratory relief, and the parties subsequently filed cross-motions for summary judgment, or in the alternative, summary adjudication. Golden Eagle's motion contended that (1) Century had a duty to defend Cal Coast because there was a potential for coverage under its policy at the time of tender, and (2) the "pro rata" provision in Golden Eagle's policies, rather than "excess only" provision in Century's policy, was applicable to Cal Coast's claim.

Following a hearing on January 31, 2002, the trial court concluded that Century had breached its duty to defend Cal Coast, and it was obligated to indemnify Golden Eagle. Judgment in favor of Golden Eagle and against Century was filed on May 7, 2002, pursuant to a stipulation regarding damages.

DISCUSSION

Century contends that the trial court erred in granting summary judgment. It argues that under the circumstances of this case, the "excess only" provision in its policy limited coverage to excess coverage, and thus it had no obligation to defend or indemnify Cal Coast until primary coverage was exhausted. We disagree.

As we explain below (see pt. B., *ante*), Century had a duty to defend Cal Coast upon tender of the arbitration demand in the Solemint action, and thus it was obliged to contribute to the defense and settlement of that action, notwithstanding the "excess only" provision in its policy. As we also explain below (see pt. C., *ante*), Century's briefs on

appeal are devoted almost exclusively to an issue--namely, a purported conflict between the "pro rata" provision in the Golden Eagle policies and the "excess only" provision in the Century policy--that we need not address in resolving this appeal.

A. *Standard of Review*

"Summary judgment is proper if there is no triable issue of material fact and the moving party is entitled to summary judgment as a matter of law. (Code Civ. Proc., § 437c.)" (*National Auto. & Cas. Ins. Co. v. Underwood* (1992) 9 Cal.App.4th 31, 36.) We review the trial court's ruling on Golden Eagle's motion for summary judgment de novo. (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)[2]

B. *Duty to Defend*

At the outset, we observe that an insurer who improperly declines to defend its insured may be required to contribute to the defense and reasonable settlement of the action against the insured. (*Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 974, 978.) Because Century does not challenge the application of this principle in the case before us, the key issue presented on appeal is whether Century correctly refused to defend Cal Coast when the arbitration demand in the Solemint action was tendered to it.[3]

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[2] The parties raised objections to the respective adverse showing, but failed to press for rulings from the trial court on these objections. Accordingly, these objections are waived. (Code Civ. Proc., § 437c, subd. (b).)

[3] For the first time during oral argument, Century questioned the application of this principle on two grounds. Century pointed to (1) various equitable considerations (i.e., Golden Eagle's representations to Century regarding the alleged damages in the Solemint action, and purported benefits to Cal Coast if Golden Eagle's request for contribution is denied), and it argued that (2) Golden Eagle acted as a volunteer in defending and settling the Solemint action.

1. *Principles Governing the Duty to Defend*

Generally, "[t]he defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage." (*Montrose I*, *supra*, 6 Cal.4th at p. 295.) As our Supreme Court explained in *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081: "[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263 . . . (*Gray*).) As we said in *Gray*, 'the carrier must defend a suit which *potentially* seeks damages within the coverage of the policy.' [Citation.]"

In *Montrose I*, *supra*, 6 Cal.4th at p. 300, the Supreme Court further clarified: "[In *Gray*] we said that 'the insurer need not defend if the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage*.' [Citation.] The quoted language cannot reasonably be understood to refer to anything beyond a bare 'potential' or 'possibility' of coverage as the trigger of a defense duty."

Generally, "[t]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when

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These contentions are waived. Appellants may not raise novel contentions after the completion of briefing. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9.) Here, Century argued at length before the trial court and in its appellate briefs that equitable considerations barred a contribution from Century *if* the terms of its policy provided only excess coverage regarding the Solemint action. However, prior to oral argument, Century never raised the distinct issue presented here, namely, whether contribution was inequitable or otherwise improper *if* Century incorrectly refused to defend Cal Coast in the Solemint action. Such contentions cannot be first presented during oral argument, given the complex analysis required for their resolution (see *Truck Ins. Exchange v. Unigard Ins. Co.*, *supra*, 79 Cal.App.4th at p. 974 [propriety of contribution from insurer that declines to participate in underlying action depends on particular facts of case]; *Union Pacific Corp. v. Wengert* (2000) 79 Cal.App.4th 1444, 1447-1448 [a party is entitled to contribution for a payment when made in good faith and under a reasonable belief that the payment is necessary for the party's protection]).

they reveal a possibility that the claim may be covered by the policy. [Citation.]" (*Horace Mann Ins. Co. v. Barbara B.*, *supra*, 4 Cal.4th at p. 1081.)

Extrinsic facts available to the insurer may also properly establish that it has no duty to defend, provided that they are "'undisputed facts which conclusively eliminate a potential for liability.'" (*Montrose I*, *supra*, 6 Cal.4th at pp. 298-299.) To establish the absence of a duty to defend on summary judgment, an insurer may show that "the underlying claim [could] not come within the policy coverage by virtue of the scope of the insuring clause or the breadth of an exclusion." (*Id.* at p. 301.) However, "[f]acts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, . . . add no weight to the scales." (*Ibid*.)

2. *Application to Present Case*

The existence of the duty to defend turns "'upon those facts known by the insurer at the inception of a third party lawsuit.'" (*Montrose I*, *supra*, 6 Cal.4th at p. 295, quoting *Saylin v. California Ins. Guarantee Assn.* (1986) 179 Cal.App.3d 256, 263.) On summary judgment, Golden Eagle contended that nothing available to Century when it refused to participate in the Solemint action conclusively eliminated the potential for coverage under the Century policy. The trial court agreed with Golden Eagle. In view of the parties' respective showings on this matter, the trial court ruled correctly.

Here, it undisputed that on January 28, 1999, Cal Coast--through its broker--tendered the arbitration demand directly to Century at the inception of Solemint action. In making this tender, Cal Coast did not provide any information to Century other than the demand. On January 29, 1999, the day after Cal Coast tendered the demand, Century refused to defend Cal Coast, and it subsequently reaffirmed this position on June 25, 1999. These refusals were based on the holding in *Montrose II* and the "excess only" provision.

Signore's letters disclose the following rationale for the denial: Century determined that the damages in the Solemint action began in or about 1992, and were continuous and progressive thereafter. Under *Montrose II*, it reasoned that Golden Eagle's policies provided primary coverage during the Century policy period. Because Century's "excess only" provision denies primary coverage when "other valid and collectible insurance is available to [the] insured for a loss" falling under the basic coverage clauses of the Century policy, Century refused to defend Cal Coast, absent exhaustion of primary coverage provided by its other insurers.

Once an insured makes a prima facie showing that the third party claim potentially falls within policy coverage, the insurer must establish that it *cannot*. (*Montrose I*, *supra*, 6 Cal.4th. at p. 300.) Here, the arbitration demand submitted by Cal Coast, on its face, potentially sought damages within the coverage of the Century policy. The demand characterized Solemint's claims against Cal Coast as "[n]egligent performance of services rendered on the Riverpark project and breach of written contract," but it did not allege that the damages were continuous and progressive or episodic in nature.

Generally, in most construction defect cases involving CGL policies of the type at issue here, "courts follow the general rule that coverage is triggered on the *date of injury*, not on the date of the defective construction that caused the injury [i.e.,] the loss 'occurred' when the injured party was actually damaged." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶ 7:1434, p. 7E-18.) Moreover, the proper trigger of coverage is determined on a defect-by-defect basis. (*Id*. at ¶ 7:1437, p. 7E-19.) Accordingly, Century could not properly determine from the arbitration demand itself that the damages alleged fell under *Montrose II*.

Because Cal Coast submitted nothing to Century other than the arbitration demand, the key question is whether Century then possessed extrinsic facts from other sources that conclusively nullified the potential for policy coverage. Here, the record indicates that Century relied solely on the collateral tenders by Golden Eagle. These tenders were apparently intended to give Century adequate notice of the Solemint action,

thereby paving the way for a request from Golden Eagle for equitable contribution from Century should it decline to participate (See *Truck Ins. Exchange v. Unigard Ins. Co., supra,* 79 Cal.App.4th at pp. 973-984).

On summary judgment, Century submitted a declaration from Signore, who stated that he had investigated Cal Coast's claim, and had determined that the pertinent damages were continuous and progressive "[b]ased upon the documents and investigative information available to [him] at the time of tender." However, Signore does not cite anything that he reviewed beyond the arbitration demand and the letters from Pratali.

We therefore examine whether the information in Pratali's letters constituted "'undisputed facts which *conclusively eliminate*[*d*] a potential for liability.'" (*Montrose I*, *supra*, 6 Cal.4th at pp. 298-299, italics added.) Both letters stated that the description of the alleged damages as progressive and continuous were "[b]ased upon . . . *initial information*" (italics added), and no source for this description was indicated. Pratali's second letter, unlike his first letter, refers to Cal Coast as the source of some information, but this information is solely about the date of the relevant construction project and Cal Coast's role in this project. The tentative nature of Pratali's information is displayed in his second letter, which corrected and elaborated statements made in his first letter.

Tentative and incomplete information of this sort does not nullify the potential for policy coverage. In *County of San Bernardino v. Pacific Indemnity Co.* (1997) 56 Cal.App.4th 666, a county created a landfill in 1955, and until 1973, a single insurer provided primary coverage concerning the landfill operations under a CGL policy. (*Id*. at p. 673.) Starting in 1980, adjacent landowners sued the county, alleging that it had negligently allowed gases to escape from the landfill. (*Id*. at pp. 673-674.)

Although the landowners' complaints did not allege the dates of injury, the insurer declined (in whole or in part) to defend these actions on the ground that the injuries had occurred after 1973. (*County of San Bernardino v. Pacific Indemnity Co., supra*, 56 Cal.App.4th at pp. 674-675, 683.) The insurer's basis for this denial was a 1997

engineering report indicating that for a two-week period in 1997, no gases were detected at the landfill. (*Id*. at pp. 685-686.)

Under the principles stated in *Montrose I*, the court in *County of San Bernardino* held that this report did not adequately support the insurer's refusals to defend. (*County of San Bernardino v. Pacific Indemnity Co., supra*, 56 Cal.App.4th at p. 686.) It reasoned that the report did not conclusively rule out the possibility of gas releases during the policy period, noting that the report itself did not conclude that the landfill could not have emitted gases before 1997, and it was otherwise subject to attack by conflicting evidence at trial. (*Ibid.*; see also *Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030, 1043-1047 [environmental agency's order and plan that did not conclusively eliminate potential for policy coverage did not adequately support insurer's refusal to defend].)

In view of *County of San Bernardino*, Pratali's letters did not conclusively nullify the potential for coverage under Century's policy. The letters characterized the alleged damages in the Solemint action on the basis of "initial information" from an undisclosed source. To the extent that Pratali's statements may have been based on his interpretation of the allegations in the arbitration demand, they constituted only legal opinion, and were irrelevant to establish the facts regarding Century's duty to defend. (See *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 602; *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865.) To the extent that these statements may have rested upon facts from an undisclosed source, they lacked any indicia of certainty. In either case, Pratali's characterization of the alleged damages, on its face, was tentative and subject to possible revision.

Century suggests that Pratali's statements or, alternatively, related allegations in Golden Eagle's complaint, amount to judicial admissions about the nature of the damages in the Solemint action. We disagree. Absent special circumstances, statements by a party are evidentiary admissions but are not conclusive, and may be rebutted by contradictory evidence. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 91, pp. 794-

795.) However, statements in a pleading may rise to judicial admissions, which are conclusive concessions on the truth of a matter. (*Id.* at § 97, p. 799.)

Here, Pratali's statements occurred outside of any pleading or judicial forum, and as we have explained, they cannot be regarded as conclusive on the nature of the damages in the Solemint action. Furthermore, although Golden Eagle's unverified complaint against Century refers to allegations of continuous and progressive damage in the Solemint action, it also broadly characterizes the Solemint action as potentially seeking damages covered by the Century policy.[4] Generally, ambiguous allegations in unverified complaints do not rise to judicial admissions, when, as here, the plaintiff has subsequently clarified these allegations. (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066-1067.)

During oral argument, Century contended that an insurer that refuses to defend an action proceeds at its own risk, but it does not incur any liability for its refusal unless it is later shown that coverage, or potential coverage, existed under the policy (see, e.g., *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1571; *Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 173). In view of this principle, it argued that even if Pratali's letters do not adequately support its refusal to defend the Solemint action, other facts existed at the time of the refusal that Century *could have* discovered, and that conclusively vindicated its refusal.

On this matter, Century pointed to a declaration from Barry MacNaughton, who represented Solemint in the arbitration with Cal Coast. He stated that Solemint took the position throughout the arbitration that its damages were continuous and progressive. MacNaughton added: "I would have advised anyone who inquired of this position." In

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[4] Golden Eagle's complaint alleges: "15. [The Solemint] action alleges that continuous, progressive property damage occurred during, but not limited to, the periods of [Century's] and Golden Eagle's policies. [¶]. . . [¶] 17. In the [Solemint] action, claimants and/or cross-claimants *allege facts that create the potential for an award of damages for property damage or personal injury which occurred during the [Century] and Golden Eagle policy periods*." (Italics added.)

view of MacNaughton's declaration, Century argued that any inadequacies in its investigation of Cal Coast's claim were harmless.

Century is mistaken, for two reasons. First, as our Supreme Court stated in *Montrose II*, *supra*, 6 Cal.4th at page 295, the duty to defend "'may exist even where coverage is in doubt and ultimately does not develop.'" (Quoting *Saylin v. California Ins. Guarantee Assn.*, *supra*, 179 Cal.App.3d at p. 263.) Under this principle, an insurer that has refused to defend on the basis of inadequate facts in its possession cannot cure its error by pointing to other facts existing at the time of its refusal that *could have* vindicated the refusal, had the insurer established these facts. (*Mullen v. Glens Falls Ins. Co.*, *supra*, 73 Cal.App.3d at pp. 172-174; *Perkins v. Allstate Ins. Co.* (C.D. Cal. 1999) 63 F.Supp.2d 1164, 1174-1175.)

In *Mullen v. Glens Falls Ins. Co.*, *supra*, 73 Cal.App.3d 163 (*Mullen*), the court rejected the contention that Century advances here. In that case, the underlying third-party complaint alleged that the insureds' son, while operating a car, had struck the third party. (*Id*. at pp. 165-168.) These allegations indicated that the incident fell outside the coverage of the pertinent policy, which contained an exclusion for damages arising from operation of an automobile. (*Ibid*.) However, the insurer also received a report indicating that the alleged incident involved a scuffle outside the car at a service station. (*Ibid*.) The insurer nonetheless declined to provide a defense, citing the automobile operation exclusion. (*Ibid*.) A judgment against the insureds' son grounded upon an intentional assault was subsequently entered in the third party action. (*Id*. at p. 168.)

Thereafter, the insureds sued the insurer for its failure to defend their son. (*Mullen, supra*, 73 Cal.App.3d at p. 168.) During this suit, the third party testified in deposition that the son had attacked him with a tire iron, saying, "'I am going to kill you.'" (*Ibid.*) In view of this testimony and other facts, the trial court concluded that the insurer had not been obligated to defend the insureds' son. (*Ibid*.)

On appeal, the insurer in *Mullen*, like Century, contended that it had assumed the risk of liability in declining to provide a defense, but it had not incurred any such

liability. The insurer argued that there had *never* been any potential for policy coverage because the son had committed a willful, unprovoked assault, and thus coverage was barred under Insurance Code section 533. (*Mullen, supra*, 73 Cal.App.3d at pp. 172-174.)

The court in *Mullen* rejected this contention and reversed the judgment in the insurer's favor. (*Mullen, supra*, 73 Cal.App.3d at p. 174.) It observed that the insurer, "without having all of the facts before it," had refused to provide a defense, even though the facts in its possession did not conclusively preclude the potential for coverage. (*Id*. at p. 173.) To permit insurers to escape liability under such circumstances, it reasoned, would permit insurers to refuse to defend "on the slightest provocation and then resort to hindsight for the justification." (*Id*. at p. 173.) In addition, it reasoned that an insurer's duty to defend is triggered when the facts in the insurer's possession establish a potential for coverage, and this duty does not dissolve simply because it turns out that there was in fact no coverage. (*Id*. at p. 174.)

The court in *Perkins v. Allstate Ins. Co.*, *supra*, 63 F.Supp.2d 1164, also rejected the contention that Century advances. In *Perkins*, the insured's automobile insurance policy contained a resident relative exclusion clause that denied coverage to relatives residing in the insured's household. The insured became incarcerated, and he permitted a friend to drive his car. (*Id*. at pp. 1166-1167.) When the friend drove the insured's wife on an errand, they were involved in an accident, and the wife subsequently sued the insured and his friend. (*Ibid*.) Although the insurer was aware that the insured was imprisoned, it declined to defend the insured on the basis of the resident relative exclusion, relying on case authority indicating that inmates do not change their residence due to incarceration. (*Id*. at p. 1170.)

The court in *Perkins* concluded that the insurer had violated its duty to defend, reasoning that the proper test for residence under the exclusion hinged on facts not known by the insurer when it refused to defend its insured, for example, the length of the inmate's term of imprisonment. (*Perkins v. Allstate Ins. Co., supra*, 63 F.Supp.2d at pp.

1172-1173.) In so concluding, the court rejected the insurer's contention that its refusal was correct because the facts determinative of residence--though unknown to the insurer when it declined to defend--nonetheless unequivocally established that the insured and his wife shared a residence at the time of the accident. (*Id*. at pp. 1174-1175.) The *Perkins* court stated: "The relevant inquiry . . . is not concerning the facts as they now appear, but the facts as they were known to the insurer at the time coverage was sought." (*Ibid*.)

As we have explained, the facts before Century when it declined to participate in the defense of the Solemint action did not conclusively preclude the potential for coverage. In view of *Mullen* and *Perkins*, Century may not supplement this inadequate stock of facts with facts that it could have discovered, but did not.

Second, MacNaughton's declaration does not preclude the potential for coverage under the Century policy. As Golden Eagle indicated on summary judgment, other facts unknown to Century when it declined to defend Cal Coast raise the potential for policy coverage. Here, Golden Eagle pointed to a list of alleged defects that Solemint submitted during the arbitration in July 1999. Among the alleged defects are undated items that may have arisen well after the completion of the apartment complex, including ponding on roofs, wood damage due to water leaks, loosened nails, and premature failure of water lines. This defect list raises the potential that some damages occurred only within the Century policy period, notwithstanding MacNaughton's declaration. (*Horace Mann Ins. Co. v. Barbara B*., *supra*, 4 Cal.4th at p. 1081 ["Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. [Citation.]"].)

3. *Century's Other Contentions*

Century also opposed summary judgment on a different basis, namely, that a determination that the damages were continuous and progressive was *irrelevant* to its refusal to defend Cal Coast under the "excess only" provision. As we have indicated, this provision states: "If other valid and collectible insurance is available to any insured for a

loss we cover under [the coverage provisions], then this insurance is excess of such insurance and *we will have no duty to defend any claim or 'suit' that any other insurer has a duty to defend*." (Italics added.)

Century contended that the italicized portion of the provision fell outside the scope of the word "if," and was fully independent of the remainder of the provision. It thus argued that Golden Eagle's admission in Pratali's letters that it was providing a defense to Cal Coast conclusively supported its own decision not to participate in this defense.

The question thus presented is one of policy interpretation. Absent special or technical language, "[i]f the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning." (*Montrose II*, *supra*, 10 Cal.4th at p. 667.)[5] Furthermore, potential ambiguities are resolved, in the first instance, by reference to the insured's objectively reasonable expectations. (*Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 30.)

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[5] As the court explained in *Montrose II*, *supra*, 10 Cal.4th at pp. 666-667: "Insurance policies are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' controls judicial interpretation unless 'used by the parties in a technical sense, or unless a special meaning is given to them by usage.' [Citations.] If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning. [Citations.] [¶] In contrast, '[i]f there is ambiguity . . . it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. [Citation.] If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. . . .' [Citation.] 'This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, "the objectively reasonable expectations of the insured." [Citation.]'"

Under these principles, we reject Century's proposed interpretation of the "excess only" provision. The basic coverage provisions of the Century policy, as with many CGL policies, obligate Century "to defend any 'suit' seeking" damages for "'bodily injury' or 'property damage.'" As the court explained in *Maryland Casualty Co. v. Nationwide Ins. Co.*, *supra*, 65 Cal.App.4th at pp. 30-31, "any limitations on a promised defense duty must be '"conspicuous, plain and clear."'" (Quoting *Gray v. Zurich Insurance Co.*, *supra*, 65 Cal.2d at p. 273.) Here, nothing in the "excess only" provision signals that the italicized clause falls outside the scope of the word "if," and thus the proposed interpretation would defeat the insured's objectively reasonable expectations.

Finally, during oral argument, Century suggested that because Pratali's letters stated that Golden Eagle was providing Cal Coast with a defense in the Solemint action, the condition immediately following the "if" in the "excess only" provision was satisfied, and thus Century properly concluded that its policy provided only excess coverage. This contention is meritless.

The condition in question was met only if "other valid and collectible insurance [was] available" to Cal Coast for losses falling under the coverage provisions of the Century policy. As we have indicated (see Pt. B.2., *ante*), Pratali's letters did not conclusively rule out the potential that some of the damage alleged in the Solemint action fell *exclusively* within the coverage of the Century policy. Accordingly, Century had a duty to defend Cal Coast in the Solemint action. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49 [insurer is generally obligated to defend entire action when some claims are potentially covered by insurer's policy].)

Summary judgment was therefore properly granted.

C. *"Pro Rata" Provisions v. "Excess Only" Provisions*

Century devotes virtually the entirety of its briefs to urging us to address an issue involving its "excess only" provision that was recently resolved against it in *Century*

Surety Co. v. United Pacific Ins. Co., supra, 109 Cal.App.4th 1246. For the reasons that we explain below, we decline to do so.

In *Century Surety Co*., Century and three other insurers issued CGL policies to a general contractor covering discrete periods beginning in 1993. (*Century, supra*, 109 Cal.App.4th at p. 1251.) Century's policy contained the "excess only" provision at issue in this appeal, and the policies issued by the other insurers contained a "pro rata" provision identical to that found in the Golden Eagle policy. (*Id*. at pp. 1251-1252.)

When homeowners in a housing development built by the general contractor sued the general contractor, only Century declined to provide a defense, citing the "excess only" provision. (*Century, supra*, 109 Cal.App.4th at p. 1253.) Following a settlement of the homeowners action, Century sought declaratory relief against the other insurers regarding its conduct, and one of the other insurers cross-complained for declaratory relief. (*Ibid*.) After the parties filed cross-motions for summary judgment, the trial court granted summary judgment against Century. (*Id.* at pp. 1253-1254.)

Unlike the case before us, the issue in *Century Surety Co*. did not concern whether Century, in denying the general contractor's request for a defense, had properly concluded that the factual predicate of the "excess only" provision was satisfied, namely, that "other valid and collectible" primary insurance was available to the general contractor for Century policy period. The case was submitted to the court in *Century Surety Co.* on stipulated facts, and it assumed that all the circumstances necessary to sustain the operation of the "excess only" and the "pro rata" provisions were present. (*Century, supra*, 109 Cal.App.4th at p. 1254.)

Rather, the court in *Century Surety Co*. addressed the resulting conflict between the operation of these provisions. Under the circumstances, Century's "excess only" provision, if enforced, permitted Century to avoid providing primary coverage for its policy period simply because the other insurers had discharged their duties under their "pro rata" provisions. (*Century, supra*, 109 Cal.App.4th at pp. 1256-1257.) The *Century Surety Co*. court concluded that this result was improper, and that the "excess only" and

"pro rata" provisions should be set aside in favor of an equitable pro rata apportionment of settlement funds and defense expenses. (*Id*. at p. 1260.)

It is unnecessary for us to revisit this conclusion. As we have explained (see p. B., *ante*), upon tender of the defense in the Solemint action, Century failed to identify facts demonstrating that the "excess only" clause discharged its duty to defend, and these facts were never subsequently developed. For this reason, the situation envisaged in *Century Surety Ins*. was not established in the present case. Because summary judgment is properly affirmed on grounds other than those addressed in *Century Surety Ins*., we decline to reassess the holding in that case.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.